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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-698

LAKE MICHIGAN COLLEGE FEDERATION OF TEACHERS AND EDWARD SHAFFER, INDIVIDUALLY AND AS REPRESENTATIVE OF OTHER INDIVIDUALS SIMILARLY SITUATED AND TOO NUMEROUS TO CONVENIENTLY BE HERE SET FORTH,

Petitioners,

vs.

LAKE MICHIGAN COMMUNITY COLLEGE, A PUBLIC EDUCATION INSTITUTION ESTABLISHED UNDER THE LAWS OF THE STATE OF MICHIGAN, ET AL.,

Respondents,

and

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

Intervening Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT LAKE MICHIGAN COMMUNITY COLLEGE IN OPPOSITION

THEOPHIL C. KAMMHOLZ
ROBERT C. CLAUS
PAUL F. GLEESON
THOMAS A. BAKER
MICHAEL G. CLEVELAND
115 South LaSalle Street
Chicago, Illinois 60603
Counsel for Respondents

Of Counsel:
VEDDER, PRICE, KAUFMAN
& KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 518 F. 2d 1091. The opinion of the District Court is reported at 390 F. Supp. 103. Both opinions are reproduced in the Petition for a Writ of Certiorari (hereinafter, "the Petition") (Apps. C and F).[1]

1. References designated as "App. ....." are to Appendices to the Petition. References designated as "R. App. ....." are to the Appendix to this Brief.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held, on the specific facts of this case, that Petitioners did not possess a constitutionally protected property interest in continued employment with Respondent College, where the District Court found there was no contract, custom, collective understanding or tenure provision supporting that interest, and where it is undisputed that the striking teachers were not covered by state tenure or civil service statutes.

2. Whether the Court of Appeals properly held, on the specific facts of this case, that by their terminations Petitioners were not deprived of liberty, within the meaning of the Fourteenth Amendment to the United States Constitution, where the uncontradicted record evidence showed that there was no resultant opprobrium, adverse opinion or reaction against Petitioners among the community or other employers, and Respondents' action did not foreclose other public employment to Petitioners.

3. Whether the Court of Appeals properly held, assuming *arguendo* that a requisite property or liberty interest was shown, that Petitioners' right to a fair hearing would not be violated if the Respondent Board of Trustees held disciplinary hearings as mandated by a state statute, where the Michigan Employment Relations Commission, on the facts of the case, had exonerated the Respondent College of bad faith bargaining charges, and where the Court of Appeals found no record evidence of bias as to any issue to be decided by the Board of Trustees at the hearings.

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

The Constitutional provisions, rules and statutes involved are cited and reproduced in the Petition.

STATEMENT OF THE CASE

Respondents are Lake Michigan Community College, a public educational institution organized under the laws of the State of Michigan (hereinafter, "the College"), its President and its Board of Trustees. Petitioners are Lake Michigan College Federation of Teachers, a labor organization representing teachers employed by Respondent (hereinafter, "the Union"), and various faculty members formerly employed by the College. Collective bargaining between the Union and the College is subject to comprehensive regulation under the Michigan Public Employment Relations Act (hereinafter, "PERA"),[2] which defines unfair labor practices, provides representation and dispute settlement procedures, prohibits public employee strikes, and provides disciplinary procedures in connection therewith.

The Union and the College have had a collective bargaining relationship since 1967; the 1970-72 bargaining agreement expired in August, 1972. Although bargaining for a successor contract had commenced in February, 1972, no agreement had been reached when the 1972-73 school year opened, and as the District Court found, the faculty reported for work without either collective or individual contracts of employment (App. C, p. 64, n. 34; App. F, p. 112, 119).

Negotiations continued during the school year, utilizing both fact-finding and mediation procedures provided by PERA. On February 7, 1973, agreement was reached on all outstanding issues, including salaries. Although acceptance of the contract

2. M. C. L. A. § 423.201 *et seq.*, M. S. A. § 17.455(1) *et seq.*

was recommended by the Union leadership, it was rejected by the faculty. On February 9, 1973, the Union notified the College that it would strike if no acceptable contract were reached; and on February 15, 1973, nearly all of the faculty commenced a strike accompanied by picketing (App. F, p. 112-14).

Section 6 of PERA[3] prohibits strikes by public employees and authorizes discipline and discharge of employees who violate this prohibition, guaranteeing such disciplined or discharged employees a post-termination hearing before the employing body and judicial review thereof in the state court system. The College did not exercise its statutory right to discharge immediately, but attempted to have the faculty return to their abandoned classrooms voluntarily. When the College found itself unable to effectuate the voluntary return of the striking faculty or to hire sufficient temporary replacements to continue the students' education, it informed the striking faculty on February 27, 1973, that if they did not return to work by March 5, 1973, they would be terminated pursuant to Section 6 of PERA. At this time faculty who might have been absent from class due to reasons other than the concerted work stoppage were requested to so notify the College. On March 5, 1973, the President informed the faculty who continued to strike illegally that they were terminated, and informed them of their hearing rights under Section 6 (App. F, p. 114-15).

The striking faculty requested such hearings, which were scheduled to commence on April 9, 1973. On April 6, 1973, however, Petitioners obtained an *ex parte* temporary restraining order against the holding of these hearings; and they have been postponed pending resolution of this case (App. F, p. 115). In their Complaint, Petitioners raised three claims of constitutional deprivation: first, that the faculty was entitled to pre-termination hearings; second, that the College's Board was in fact biased against the faculty and thus could not hold the hearings, despite the clear command of PERA to that effect; and third, that the procedures established by the College for the conduct of the hearings did not comport with minimal due process guarantees.

3. M. C. L. A. § 423.206, M. S. A. § 17.455(6); reproduced at page 4 of the Petition.

On April 30, 1973, the District Court entered a mandatory interlocutory injunction against the Respondents, ordering the immediate reinstatement of the striking faculty. That order was stayed by the United States Court of Appeals for the Sixth Circuit the next day, and was set aside by that Court as an abuse of discretion on July 9, 1973 (App. F, p. 115).

Following a hearing on the merits, the District Court entered its Opinion and Order on September 27, 1974 (Apps. C and D). The District Court made numerous findings of fact and conclusions of law, including the following: (a) the constitutionality of PERA was not at issue; (b) although the faculty had no individual or collective employment agreements, and were not covered by state tenure or civil service statutes, they did have a legitimate expectancy of continued public employment at the time of their termination because PERA prohibits termination of public employees for engaging in protected or concerted activities; (c) termination because of violation of the no-strike law *per se* infringed the faculty's liberty; (d) the faculty was not entitled to a pre-termination hearing on the facts of this case; and (e) the College, because it had bargained in bad faith with the Union, was in fact biased against the faculty, and based on the specific facts of this case could not hold the required Section 6 hearings. The District Court enjoined the holding of such hearings by the College, and directed the latter to file an action in the state court to have it decide the factual issue of whether the faculty's strike was in violation of PERA.

Prior to issuance of the District Court's Decision, the Michigan Employment Relations Commission (hereinafter, "MERC"), which administers and enforces PERA, following a full evidentiary hearing, dismissed the Union's charge that the College

had bargained in bad faith. That decision has been upheld by the Michigan Court of Appeals, ... Mich. App. ....., 231 N. W. 2d 538 (1975), and is currently before the Michigan Supreme Court on the Union's petition for leave to appeal.

The United States Court of Appeals for the Sixth Circuit reversed the judgment of the District Court on July 2, 1975, and remanded the case for dismissal of the Complaint. The Court of Appeals held that—on the specific facts of this case—the discharge of the striking faculty had not deprived them of a property interest within the meaning of the Fourteenth Amendment because the faculty's continued employment was not protected by contract, custom, collective understanding or a tenure provision, or by any applicable state statute (App. F, p. 117-19). The Court of Appeals also held—on the specific facts of this case—that the faculty had not been deprived of liberty by the discharge. The Court of Appeals rejected the District Court's apparent conclusion that termination for violation of a non-criminal no-strike law is *per se* a deprivation of liberty, noting that in this case the record evidence demonstrably established that the faculty had not suffered any public opprobrium, adverse opinion or reaction among the community, and had not been foreclosed from other public employment by the terminations (App. F, p. 122-23). As an alternate basis of its decision, assuming *arguendo* the existence of a property or liberty interest, the Court of Appeals held that, in light of the Michigan Supreme Court's construction of Section 6 of PERA in *Rockwell* v. *Crestwood School District Board of Education,* 393 Mich. 616, 227 N. W. 2d 736 (1975), *U. S. App. pending,* No. 75-466, 44 U. S. L. W. 3254 (1975), the record evidence established that the Board of Trustees harbored no bias against the striking faculty which would require that it be enjoined from conducting the Section 6 hearings (App. F, p. 123-26). The Court further noted that, inasmuch as the College's sole function in the hearings would be to determine whether a given faculty member struck, any hostility toward the Union would not manifest itself

in the form of an unfair decision against a non-striker, and adverted to the meaningful and substantial protection against arbitrary action in the appellate review procedures of PERA (App. F, p. 126).

Petitioners petition for reconsideration and for rehearing *en banc* by the Court of Appeals was denied on August 14, 1975. As directed by the Court of Appeals, the District Court dismissed the Complaint on September 16, 1975.

ARGUMENT

I. This Case Does Not Present a Question of General Importance Appropriate for Consideration by This Court.

The decision of the Court of Appeals on the three key issues of this case depended on record factual evidence, and this case presents no legal questions of general public importance. Thus, the Court of Appeals reviewed Petitioners' contention that the expired collective bargaining agreement and a later day-to-day understanding—terminated prior to the discharges—established a property interest, and held that "neither the bargaining agreement nor the later informal understanding conferred upon the faculty members in this case a due process property interest . . ." (App. F, p. 119). Similarly, in holding that the faculty had not been deprived of liberty, the Court of Appeals, which observed that "[e]ach case must be decided upon its own facts", reviewed the uncontradicted evidence showing that the terminations had no adverse effect on the faculty's community standing and did not foreclose their access to employment opportunities, and held that "nothing in this record" met the factual standard of this Court's decision in *Board of Regents* v. *Roth,* 408 U. S. 564 (1972) (App. F, p. 122-23). Finally, in reversing the District Court's finding that the Board of Trustees was biased as a matter of fact, the Court reviewed all of the record evidence in light of the Michigan Supreme Court's authoritative inter-

pretation of PERA and held that ". . . there is nothing in the record to indicate that the Board will not [conduct the Section 6 hearings] fairly" (App. F, p. 126). Thus, it is apparent that this case depends on manifold factual determinations by the Courts below. Indeed, the Petition repeatedly asks this Court, in effect, to reweigh the record evidence in a manner favorable to Petitioners and reverse the Court of Appeals' factual conclusions (*e.g.*, p. 9-12, 17-21, 28-31).[4] Because this case so obviously depends on factual determinations on matters virtually unique and significant only to the parties, it is not appropriate for consideration by this Court.[5]

II. No Case Presenting Similar Issues Is Pending Before This Court.

Although certiorari has been granted in *Hortonville Joint School District No. 1* v. *Hortonville Education Association*, 66 Wis. 2d 499, 225 N. W. 2d 658 (1975), *cert. granted*, No. 74-1606, 44 U. S. L. W. 3180, that case presents a fundamentally different question from any involved herein. The only issue presented in *Hortonville* is whether the Wisconsin Supreme Court properly held that a local school board must be presumed to be so biased against striking teachers that its decision to discharge them did not meet the constitutional requirement of impartiality. In contrast, the issue of bias in this case is, as the District Court stated, "only whether the . . . Board of Trustees is actually biased as a matter of fact under the circumstances of this case" (App. C, p. 94). Thus, the issue in this case is the weight to be accorded various facts, not, as in *Hortonville*, the propriety of a judicial assumption of bias. The broad issue of *Hortonville*, involving a sweeping constitutional presumption of bias which would apply in many situations across the nation, particularly

4. *See United States* v. *Johnston*, 268 U. S. 220, 227 (1925): "We do not grant a certiorari to review evidence and discuss specific facts."

5. *See Magnum Import Co.* v. *Coty*, 262 U. S. 159 (1923); *Lane & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387 (1923).

in the absence of a comprehensive state statute regulating discipline of teachers for illegal strikes,[6] far transcends and differs significantly from the specific and factually unique questions in this case.

The only means by which a challenge based on presumed bias could have been made in this case was by attack on the constitutionality of PERA itself. This case, however, does not involve the constitutionality of PERA, its provisions authorizing discharge of strikers by the public body that engaged in collective bargaining negotiations, or its provision requiring that public body to be the decision-maker in the hearings mandated by PERA. Indeed, a three-judge district court, originally convened in this case on Respondents' motion, dissolved itself after determining that the constitutionality of PERA was not at issue herein (R. App. p. A1-A3).

The decisions of the lower courts in this case turned solely on whether specific facts showed that the Board of Trustees could perform its statutory hearing function under Section 6 of PERA without bias. Moreover, unlike *Hortonville*, this case presents no issue of bias in the initial decision to terminate the strikers. Indeed, in *Rockwell* v. *Crestwood School District Board of Education, supra*, the Michigan Supreme Court held that the employing body was not called upon in the Section 6 hearings to decide whether its decision to discharge strikers was in general justified. Rather, those hearings are limited to determining whether employees were correctly identified as strikers, with questions as to bad faith bargaining or improper discharges being left to MERC.

Further, not only is the bias issue in this case of a vastly different character from that presented in *Hortonville*, but this case presents two additional issues that must be decided differently from the Court of Appeals' decision before the issue of bias can even be reached. The issue of alleged bias is relevant in

6. Unlike Michigan, Wisconsin has no such comprehensive statute limiting the dismissal powers of the employing body and providing substantial judicial review of its decisions.

this case only if this Court holds—contrary to the Court of Appeals—that the termination of the striking faculty constituted a deprivation of property and/or liberty. Accordingly, granting certiorari in this case would not assist this Court in its resolution of the bias issue in *Hortonville* because the bias issue in this case is far narrower than and completely different from that in *Hortonville,* and because unique and complex factual issues concerning the existence of a liberty or property interest are presented herein.

III. The Decision of the Court Below Is Correct on the Merits.

In reversing the District Court, the Court of Appeals held, first, that the striking faculty had not been deprived of property or liberty within the meaning of the Fourteenth Amendment. As an alternate ground of decision, the Court assumed that the faculty possesed a protected property or liberty interest and held, contrary to the District Court, that the Board of Trustees was not precluded by bias from holding the Section 6 hearings. These holdings are correct on both the law and the facts.

The Court of Appeals' decision on the issue of protected property and liberty interests is fully in accord with this Court's decisions in *Roth* v. *Board of Regents, supra,* and *Perry* v. *Sindermann,* 408 U. S. 593 (1972). Those cases establish that for public employees to have an entitlement to a benefit they "must have more than a unilateral expectation of it"; instead they must "have a legitimate claim of entitlement of it" (*Roth, supra,* at 578). Whether a protected property interest exists is to be judged by the facts of each case because "property interests . . . are created and defined by existing rules or understandings" (*Roth, supra,* at 578). Similarly, whether termination deprives a public employee of liberty is a question of fact to be decided on the record in each case (*Roth, supra,* at 573-75).[7]

Expressly applying these principles, the Court of Appeals correctly found that Petitioners possessed no entitlement to con-

7. This Court affirmed these principles in *Arnett* v. *Kennedy,* 416 U. S. 134 (1974), and *Goss* v. *Lopez,* 419 U. S. 565 (1975).

tinued public employment protected by the Fourteenth Amendment. The District Court had itself found that the faculty were not covered by any individual or collective bargaining agreement or collective understanding at the time of the strike (App. C, p. 64, n. 34). Consistent with this finding, the Court of Appeals rejected Petitioners' contention that the day-to-day understanding continued in effect beyond the strike despite their material breach thereof and the College's notice of termination. The Court of Appeals found that the College had legitimately terminated this understanding in response to Petitioners' material breach of the understanding by striking (App. D, p. 119).[8]

The Court of Appeals correctly reversed the District Court's only finding supporting a property interest in Petitioners: *viz.,* that PERA itself creates such an interest. The Court of Appeals held that PERA does not create an entitlement to public employment simply because it establishes certain procedures to be followed in discharging a striking employee.[9] The statutes involved in *Arnett* v. *Kennedy,* 416 U. S. 134 (1974), and similar cases finding a statutory property right relied upon in the Petition,[10] constituted comprehensive schemes delineating the full employment rights of certain employees, while PERA is directed to one limited aspect of the employment relationship. As the Court of Appeals observed, PERA does not create anything more

8. Unlike this case, the strikers in *Hortonville* were working under individual written contracts for a given term that did not contain any provision prohibiting strikes. In further contrast to the individual contracts of the *Hortonville* strikers, the day-to-day understanding in this case was subject to termination at will by either party. *O'Connor* v. *Hayes Body Corp.,* 285 Mich. 280 (1932).

9. Other Courts of Appeals have taken this same position regarding similar statutes. *Ring* v. *Schlesinger,* 502 F. 2d 479, 487 (D. C. Cir., 1974); *Suckle* v. *Madison General Hospital,* 499 F. 2d 1364, 1366 (7th Cir., 1974). *See also, Adams* v. *Walker,* 492 F. 2d 1003 (7th Cir., 1974); *Amezquita* v. *Colon,* 518 F. 2d 8 (1st Cir., 1975).

10. *Young* v. *United States,* 498 F. 2d 1211 (5th Cir., 1974); *T. A. Moynahan Prop., Inc.* v. *Lancaster Village Corp.,* 496 F. 2d 1114 (7th Cir., 1974); *Indiana State Employees Association, Inc.* v. *Boehring,* 511 F. 2d 834 (7th Cir., 1975), *rev'd on other grounds,* 44 U. S. L. W. 3275 (1975).

in covered employees than an expectation that they will be discharged for striking. Under this Court's decisions, the test is not whether an employe's right to discharge is limited in any respect, but whether an entitlement was initially created. PERA, therefore, cannot *per se* give rise to a property interest in continued employment.

Petitioners also have sought to establish a property right by arguing that they had a legitimate expectancy of continued employment. But, as this Court held in *Roth, supra,* mere unilateral expectancy of continued employment does not rise to the level of a property interest. Moreover, Petitioners have never argued in this case that there was any extra-contractual, extra-statutory understanding that they would be entitled to employment simply by the passage of time, such as contemplated in *Perry* v. *Sindermann, supra.* Accordingly, Petitioners' citation of *Soni* v. *Board of Trustees,* 513 F. 2d 734 (6th Cir., 1975), involving a *Sindermann*-type extra-contractual, extra-statutory understanding, is inapposite.[11]

Petitioners also have argued that they possessed a contractual right to continued employment because the College was obliged to continue in effect the security of employment provision of the contract under the day-to-day understanding, notwithstanding the pre-discharge termination of that understanding. The Court of Appeals properly rejected this contention without discussion because the security of employment provision itself (App. A, p. 38) confers on the Board the unilateral right to discharge

11. Similarly, *Caramico* v. *Secretary of Housing and Urban Development,* 509 F. 2d 694 (2nd Cir., 1974), also relied upon by Petitioners, does not support Petitioners' apparent contention that merely because they may have held their positions for an extended period of time, they had a constitutionally protected property interest therein. *Caramico* involved a regulation requiring that a mortgagee seeking to recover from the Federal Housing Administration on his mortgage insurance tender possession of the property unoccupied, with certain exceptions. The Second Circuit held that tenants of such defaulting property had a constitutionally protected interest in continued occupancy "when that occupancy is not flatly prohibited by regulation" 509 F. 2d at 700. The Court thus found that the regulation itself, by virtue of the exceptions, conferred a property interest that tenants could not be deprived of without due process.

teachers who, like the striking faculty, fail to perform satisfactorily their teaching duties.

The Court of Appeals also correctly decided that Petitioners had not been deprived of liberty within the meaning of the Fourteenth Amendment. The Court of Appeals rejected the contention that merely because the striking faculty were terminated for violating a state law they were *per se* deprived of liberty. Not all state laws establish standards of honesty, morality or integrity. As the Court of Appeals observed, the record showed Petitioners had openly engaged in strike activities, and there was no hostile community reaction or loss of employment opportunities as a result of such activities. Noting *Roth's* holding that mere loss of position does not amount to deprivation of liberty, the Court of Appeals properly held that the record evidence belied Petitioners' claim that their termination had deprived them of liberty.[12]

The Court of Appeals also rejected the District Court's determination that the Board of Trustees was—on the facts of this case—prohibited by bias from holding the Section 6 hearings. After reviewing the findings made by the District Court supporting its determination that the Board of Trustees was biased, the Court of Appeals determined there was nothing in the record establishing that the Board would be biased in the performance of its statutory duty.[13] The District Court had

12. Other Courts of Appeals have likewise found no infringement of a protected liberty interest where the reason for termination does not constitute an allegation of a serious character defect, such as dishonesty or immorality. *See Gray* v. *Union County Intermediate Education District,* 520 F. 2d 803 (9th Cir., 1975) (incompetency, insubordination, hostility toward authority, aggressive behavior, personality differences and difficulty in getting along with others); *Abeyta* v. *Town of Taos,* 499 F. 2d 323 (10th Cir., 1974) (improper or inadequate performance of duties); *Adams* v. *Walker,* 492 F. 2d 1003 (7th Cir., 1974) (incompetence, neglect of duty and malfeasance in office).

13. *Ward* v. *Village of Monroeville,* 409 U. S. 57 (1972) and *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), relied upon by Petitioners, are inapposite. As in *Hortonville,* the issue in both those cases was whether bias could be presumed.

concluded that the Board's conduct during bargaining and the strike demonstrated hostility toward the strikers and the Union, and that it would be biased in the hearing because it would be called upon to decide the difficult legal issue of whether its own conduct justified the strike. However, in *Rockwell* v. *Crestwood School District Board of Education, supra,* the Michigan Supreme Court held that the Section 6 hearing does not encompass the issue of whether the employer's own misconduct is a defense to an illegal strike, but rather is limited solely to the question of whether "the employer correctly identified the particular employee as a violator of the act's prohibition against striking." 393 Mich. at 640-41, 227 N. W. 2d at 747. Thus, under state law, the Board's own bargaining conduct would not be at issue in the hearings, and no issue would be before the Board on which the record evidence even arguably showed Board bias. The Court of Appeals further noted that MERC, the body responsible for enforcement of PERA's unfair labor practice provisions, had determined that the College had bargained in good faith and had not committed an unfair labor practice, and that that determination had been affirmed by the Michigan Court of Appeals (App. F, p. 126). Lastly, as the Court of Appeals noted, even if the Board were hostile to the Union and the striking faculty, there would be no reason for this hostility to be vented against a faculty member who had not struck.

Contrary to Petitioners' argument, the Court of Appeals' reversal of the District Court's bias holding was clearly a proper exercise of its appellate function. As this Court has stated, clearly erroneous findings of fact must be reversed when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (*United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948)), As discussed above, the Court of Appeals reviewed the entire record and concluded that there was no evidence that the Board would be biased on any issue before it. Its reversal of the District Court was thus clearly proper.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THEOPHIL C. KAMMHOLZ
ROBERT C. CLAUS
PAUL F. GLEESON
THOMAS A. BAKER
MICHAEL G. CLEVELAND
115 South LaSalle Street
Chicago, Illinois 60603
Counsel for Respondents

Of Counsel:
VEDDER, PRICE, KAUFMAN
& KAMMHOLZ
115 South LaSalle Street
Chicago, Illinois 60603

Dated: December 13, 1975.

APPENDIX

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF MICHIGAN

LAKE MICHIGAN COLLEGE FEDERATION OF TEACHERS AND EDWARD SHAFFER, Individually and as representative of other individuals similarly situated and too numerous to conveniently be here set forth,
Plaintiffs,

vs.

LAKE MICHIGAN COMMUNITY COLLEGE, a Public Education Institution established under the laws of the State of Michigan,
Defendants.

No. K49-73CA8

ORDER DISSOLVING THREE-JUDGE COURT

Plaintiffs, former teachers employed by the Lake Michigan Community College and their certified bargaining agent, Lake Michigan College Federation of Teachers, have brought this action against the college alleging that the discharge of the individual plaintiffs caused by their refusal to render services on or about February 15, 1973, was unlawful and in violation both of Michigan statutes and of the United States Constitution and seeking reinstatement. Upon notification of their discharge, the individual plaintiffs, in accordance with Michigan law, timely filed a request for review of the propriety of defendant's action,

and defendant notified them of the date set for hearing the matter. Prior to the date set for hearing, plaintiffs filed this action in which their request that the hearing be stayed pending disposition of their claim that the discharge was unlawful was granted. Defendants' motion to convene a three-judge court on the grounds that plaintiffs were seeking to enjoin the operation of a state statute on the grounds that it was repugnant to the United States Constitution was granted.

Upon considering the memoranda and oral argument which has been transcribed on the question of the propriety of convening a three-judge court and it appearing from the pleadings that this is not a case in which an injunction is sought to restain the operation of a state statute on the ground that it is repugnant to the United States Constitution but is instead an action for remedial relief for an allegedly unlawful discharge from employment, *cf. Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16 (1938); *Bistrick* v. *University of South Carolina*, 319 F. Supp. 193 (D. S. C. 1970), It Is Ordered that the three-judge court be, and it is hereby dissolved and the case is remanded to the calendar of Chief Judge Noel P. Fox.

WADE H. MCCREE, JR.,
U. S. Circuit Judge.

ALBERT J. ENGEL,
U. S. Circuit Judge.

CHIEF JUDGE NOEL P. FOX dissenting:

It appears that this case may be appropriate for a three-judge district court under 28 U. S. C. Secs. 2281 and 2284. At the time when the events giving rise to this suit occurred, the plaintiffs and defendants were involved in a serious employment dispute. All parties concede that they were subject to the Michigan Public Employees Relations Act, M. C. L. A. Sec. 423.201 *et seq.* and more particularly, Section 6 of that Act, M. C. L. A. Sec. 423.206, although it is not clear precisely how the Act applies to this case. This Act plainly embodies a state

policy as to the handling of strikes by public employees. The plaintiffs have sought injunctive and other relief on the grounds that the actions of the defendants were unconstitutional. If the court concludes that the actions of the defendants were unconstitutional, and grants injunctive relief, the court may be acting within the scope of 28 U. S. C. Sec. 2281. *See School District for the City of Holland* v. *Holland Education Association*, 380 Mich. 314, 157 N. W. 2d 206, 210 (1968); *Calloway* v. *Briggs*, 443 F. 2d 296 (6th Cir. 1971).

However, the matter is not in the least free from doubt. In such circumstances, considerations of judicial economy and fairness to the parties suggest that three-judges hear the case and arrive at a conclusion after hearing all the evidence and arguments. In order to avoid the possibility of a rehearing in the event of error, the district judge before whom the case would be tried if a three-judge court were not required usually adopts the opinion and order of the three-judge court as his own. In unusual circumstances, the possibility of rehearing might be avoided by declaring the suit to be a non-statutory three-judge case.

With these considerations in mind, the original three-judge panel decided, after hearing argument on the motion for a three-judge court, that the case should proceed as a three-judge court. Final decision on the three-judge court issue was to be deferred until after a hearing on the merits. Because of the real possibility that three-judge panel is required in this case, I would adhere to the original decision.

NOEL P. FOX,
Chief U. S. District Judge.